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IN THE

SUPREME COURT OF THE UNITED STATES.

Docket No. 892

WILLIAM F. ADAMS,
Petitioner,

versus

AUTHERINE J. LUCY and POLLY ANNE MYERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

FRONTIS H. MOORE,
ANDREW J. THOMAS,
1038 Brown Marx Building,
Birmingham, Alabama,
Attorneys for Petitioner.

Of Counsel:
BURR, McKAMY, MOORE & THOMAS,
1038 Brown Marx Building,
Birmingham, Alabama.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for the issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit, affirming the judgment of the District Court for the Northern District of Alabama.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Alabama, as amended (Appendix A), is reported in Lucy v. Adams, 134 F. Supp. 235. The opinion of the Court of Appeals (Appendix B) is reported in Adams v. Lucy, 228 F. 2d 619.

JURISDICTION OF THE COURT.

Respondents (plaintiffs in the District Court) brought action in their own behalf, and in behalf of all other Negroes similarly situated with respect to the matters involved, for a declaratory judgment and for an injunction against petitioner, as Dean of Admissions of the University of Alabama, asserting that they had wrongfully been denied admission to the Schools of Journalism and Library Science at the University of Alabama on account of being Negroes. The judgment of the District Court, enjoining petitioner from denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race or color, is set out in Appendix C hereto. The judgment of the Court of Appeals, affirming the judgment of the District Court, set out in Appendix D hereto, is dated December 30, 1955. A timely petition for rehearing was denied by order dated February 1, 1956. The jurisdiction of the Supreme Court to review the judgment of the Court of Appeals is invoked under Title 28, Section 1254 (1), United States Code, Annotated.

QUESTIONS PRESENTED.

(1) Was a District Court of three judges required when an injunction is sought and granted to restrain the enforcement of a policy of the Board of Trustees of the University of Alabama on the basis that such violates the rights of plaintiffs derived from the Constitution of the United States?

(2) Were the individual members of the Board of Trustees of the University of Alabama indispensable parties to this action?

(3) Were the plaintiffs entitled to have this suit maintained and adjudicated as a class action and thereby to confer rights on those who were not parties to the action?

STATUTES AND POLICY OF STATE ADMINISTRATIVE BOARD INVOLVED.

This case involves an interpretation of 28 U. S. C. A., Section 2281, which is as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under state statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The policy of the Board of Trustees of the University of Alabama, the validity of which is attacked, has not been officially published, nor has it been reduced to writing. In his amended conclusions of law (Conclusions of Law, No. 5, Appendix A), the District Judge stated:

> "5. There is no written policy or rule excluding prospective students from admission to the University on account of race or color. However, there is a tacit policy to that effect. Defendant Adams has pursued such policy in denying applications for admission."

That the Board of Trustees of the University of Alabama is an administrative board within the purview of 28 U. S. C. A., Section 2281, appears from the provisions of Article 14, Section 264, Constitution of the State of Alabama, 1901, set out in Appendix E hereto, and Chapter 26, 1940 Code of Alabama, portions of which are set out in

Appendix F hereto, as construed by the Supreme Court of Alabama in **Cox v. Board of Trustees of the University of Alabama**, 161 Ala. 639, 49 So. 814.

This case also involves an interpretation of Rule 23(a), Federal Rules of Civil Procedure for the United States District Courts, which is as follows:

> "Rule 23. **Class Actions.**
>
> (a) **Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> • • •
>
> (3) Several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

STATEMENT OF THE CASE.

Petitioner has not filed with his petition nine copies of the record in the District Court. The District Judge, however, made a full findings of fact which is set out in Appendix A hereto. In making this statement of the case, the references to the facts, contained in the record in the District Court, will refer to said findings of fact, unless otherwise stated.

On September 4, 1952, the respondents, who will hereafter be referred to as the plaintiffs, wrote the Dean of Admissions, University of Alabama, stating that they were interested in attending the University and requesting application blanks. On the following day, petitioner, who will hereafter be referred to as the defendant, as Dean of

Admissions, University of Alabama, replied enclosing the necessary forms for admission, including application forms. Plaintiffs mailed their applications and transcripts of credits to defendant on September 17, 1952, which were received by him on the afternoon of September 19, 1952.

On the morning of September 20, 1952, the plaintiffs appeared at the office of defendant, stating that they had come to complete their registration. There is a dispute in the evidence as to the exact conversation that occurred on that occasion, but the District Judge found, in his findings of fact, that the plaintiffs' applications were rejected by the defendant at that time (Findings of Fact, Parg. 4, Appendix A).

By letter dated September 24, 1952, plaintiffs, through their attorney, applied to Dr. John M. Gallalee, President, University of Alabama, for admission to the University of Alabama. Following receipt of said letter, Dr. Gallalee contacted a party in Birmingham and asked him to use his influence with the plaintiffs' attorney in an attempt to have the plaintiffs withdraw their applications and seek admission to the Alabama State College and Tuskegee Institute, both of which are Negro institutions (Findings of Fact, Parg. 4, Appendix A).

The plaintiffs, through their attorney, presented to Governor Gordon Persons requests for admission to the University of Alabama, which requests were considered by the Board of Trustees of the University of Alabama, at a meeting on June 1, 1953. At such meeting the Board of Trustees deferred action on the matter pending a decision in the Supreme Court of the United States on litigation from the State of South Carolina and other states involving this question; and directed the Secretary to convey such information to plaintiffs' attorney and to suggest to him that they could find courses in sub-

jects desired by them at Tuskegee Institute and the Alabama State College at Montgomery; which direction was complied with in a letter addressed to the plaintiffs' attorney, under date of June 6, 1953 (Findings of Fact, Par. 4, Appendix A).

On July 3, 1953, the plaintiffs brought suit for a declaratory judgment and for an injunction against the Board of Trustees of the University of Alabama, John M. Gallalee, retired president of said University; Lee Bidgood, Acting President of said university, and the defendant, William F. Adams, Dean of Admissions of said University. The District Judge granted motions to dismiss the action filed on behalf of each of the defendants. Thereafter Oliver Cromwell Carmichael, who had taken office as President of the University of Alabama on September 1, 1953, was substituted as a party defendant in place of Lee Bidgood. Thereafter an amended complaint was filed, on which the case was tried, which is set out in Appendix G hereto. Subsequently, the District Judge granted a motion for a summary judgment in behalf of Oliver Cromwell Carmichael. As a result thereof, at the time of the trial of this case in the district court, the defendant, William F. Adams, was the sole defendant.

In the amended complaint it was alleged that jurisdiction of the district court was invoked under Title 28, United States Code, Section 1331. That the action arose under the Fourteenth Amendment to the Constitution of the United States and Title 8, United States Code, Section 41. That the jurisdiction of the court was also invoked under Title 28, United States Code, Section 1343, to redress the deprivation under color of law, statute, regulation, custom and usages of a state of rights, etc., secured by Sections 41 and 43 of Title 8, United States Code, and the Fourteenth Amendment to the Constitution of the United States. That the suit was a proceeding for a declaratory judgment and

injunction under Title 28, United States Code, Section 2201, for the purpose of determining the question of whether or not the practice of defendants, in denying plaintiffs and other Negroes similarly situated, on account of their race and color, the right to enroll and pursue courses of study at the University of Alabama, constitutes a denial of the right of plaintiffs and other Negroes similarly situated, the equal protection under the Fourteenth Amendment to the United States Constitution, and the laws of the United States. That plaintiffs bring action in their own behalf and in behalf of all other Negroes similarly situated with respect to the matters here involved; that they are so numerous as to make it impracticable to bring them all before the court; that there being common questions of law and fact, a common relief being sought, plaintiffs present this action as a class suit, pursuant to Rule 23 (a) of the Federal Rules of Civil Procedure. That defendants have established and are maintaining a policy, custom and usage of denying to qualified Negro applicants the equal protection of the laws by refusing to admit them into the schools of Journalism and Library Science at the University of Alabama, solely because of race and color.

The amended complaint prayed that the district court enter a judgment declaring that the policy, custom, usage and practice of the defendants in denying plaintiffs and others similarly situated the right to enroll, enter and pursue courses of study at the University of Alabama, on account of their race and color, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and was therefore unconstitutional and void. The district court was requested to issue a permanent injunction forever restraining and enjoining defendants, and each of them, from denying plaintiffs, and others similarly situated, the right to enroll and pursue courses of study in Journalism, Library Science and other subjects at the

University of Alabama, solely on account of their race and color.

In a motion to dismiss the complaint as last amended, which is set out in Appendix A hereto, as well as in his answer to the complaint as last amended, which is set out in Appendix I hereto, defendant questioned the plaintiffs' right to maintain this action as a class action, pursuant to Rule 23 (a), Federal Rules of Civil Procedure for District Courts. In said motion to dismiss the complaint as last amended, defendant raised the question that the individual members of the Board of Trustees of the University of Alabama are necessary and indispensable parties to this action, because of their interest in the subject matter thereof, and suggested that an order of court should be entered requiring the plaintiffs to bring in as parties defendant the individual members of the Board of Trustees of the University of Alabama. The District Judge overruled defendant's motion to dismiss the complaint as last amended, stating that such was not well taken.

In his answer to the complaint as last amended, defendant, admitting that he is the Dean of Admissions of the University of Alabama, that plaintiffs made applications for admission to said University and submitted transcripts of their scholastic records, and that the plaintiffs appeared in person in his office on September 22, 1952, with reference to their registration as students, denied all other material averments of the complaint as last amended.

The District Judge, in his amended findings of fact (Findings of Fact, Parg. 6-7, Appendix A), found as follows:

> "The evidence fails to disclose that there is a written policy or rule of the University denying admission to prospective students to that institution solely on the ground of race or color. However, other Negroes have

made applications for admission. There is no evidence that any one of them has ever been admitted. On the other hand, during the month of August, 1950, a Negro by the name of W. H. Hollins applied for admission to the Law School. The defendant furnished him an application, but the accompanying letter stated that the State had provided machinery 'through the State Department of Education to assist colored students who desired to engage in the study of law to obtain opportunities for entering high grade institutions located elsewhere **which accept colored students.**' Defendant concluded his letter by stating that, 'We hope you can persuade yourself not to file your application for admission here.'

"As late as May 31, 1955, one Agnes Studenmire wrote Dr. Carmichael, President, stating she was desirous of taking some courses at the University Extension Center in Birmingham; that she was a Negro and would like to know whether or not the policy had changed for the admission of Negroes so that she might be accepted as a student. Dr. Carmichael replied to this letter, advising her that the admission requirements of the University of Alabama have not changed in recent months."

The District Judge, in his amended conclusions of law (Conclusions of Law, No. 5, Appendix A), found as follows:

"There is no written policy or rule excluding prospective students from admission to the University on account of race or color. However, there is a tacit policy to that effect. Defendant Adams has pursued such policy in denying applications for admission."

REASONS FOR GRANTING THE WRIT.

I.

A district court of three judges was required to hear and determine the request for an injunction adjudicated and granted in this action.

By virtue of **28 U. S. C. A.**, Section 2281, an application for an injunction, which challenges an order, or policy, of an administrative board of a state as being invalid under the United States Constitution, shall not be granted unless heard and determined by a district court of three judges, such requirement being jurisdictional.[1]

In **Board of Trustees of the University of North Carolina v. Frasier**, 76 S. Ct. 467, the Supreme Court affirmed the judgment of a district court of three judges in **Frasier v. Board of Trustees of the University of North Carolina**, 134 F. Supp. 589, in which the facts, upon which the jurisdiction of the three judge court was upheld, were markedly similar to those presented in the present case. In the Frasier case, three Negroes, who were refused admission to the undergraduate schools of the University of North Carolina, brought an action for a declaratory judgment and injunction. The three plaintiffs in said case were first refused admission to the University in letters from the Director of Admissions in which they were told that the Trustees of the University had not changed the policy of admission of Negroes who were eligible to make applica-

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[1] See Ex parte Metropolitan Water Co., 220 U. S. 539; Cumberland Tel. & Tel. Co. v. Louisiana Public Service Com'n, 260 U. S. 212; Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290; Herkness v. Irion, 278 U. S. 92; Ex parte Northern Pac. Ry. Co., 280 U. S. 142; Stratton v. St. Louis Southwestern R. Co., 282 U. S. 10; Board of Trustees of the University of North Carolina v. Frasier, 76 S. Ct. 467, affirming Frasier v. Board of Trustees, 134 F. Supp. 589.

tion for graduate and professional studies not offered at a Negro college in the state, but were not eligible at that time to apply for admission to the undergraduate schools. Thereupon, the three plaintiffs requested the University to reverse its policy of discrimination against Negroes, whereupon, the Board of Trustees passed a resolution in which it was declared to be the policy of the Board of Trustees that applications of Negroes to the undergraduate schools of the University be not accepted.

In the opinion of the three judge district court in the Frasier case, after referring to various constitutional and statutory provisions providing for the establishment of the University of North Carolina and empowering its board of trustees to make rules and regulations for the management thereof, it is stated that the resolution of the Board of Trustees, above referred to, was passed under the authority of said constitutional and statutory provisions. It is stated in said opinion that there is no constitutional or statutory provision which expressly requires the segregation of the races in the University. The three judge district court upheld its jurisdiction in the Frasier case because **28 U. S. C. A., Section 2281**, "requires a three judge court not only when it is sought to restrain the enforcement of an unconstitutional statute, but also the enforcement of an unconstitutional order of an administrative board or commission, clothed with authority and acting under the law of the state."

It is submitted that the present case is not distinguished from the Frasier case by the fact that, at the time of trial, there was only one defendant, who occupied the position of Dean of Admissions, University of Alabama. While it might be contended that the complaint as last amended merely seeks to have adjudicated, as being violative of the Fourteenth Amendment of the Constitution of the United States, and therefore unconstitutional and void, the action

of the defendant in denying the plaintiffs the right to enroll as students in the University, in reality there is drawn into question the unconstitutionality of a policy, custom or usage of the Board of Trustees of the University of Alabama, an arm and agency of the State of Alabama.

That the Board of Trustees of the University of Alabama is an administrative board within the purview of **28 U. S. C. A., Section 2281,** appears clearly from the provisions of Article 14, Section 264, **Constitution of the State of Alabama, 1901,** set out as Appendix E hereto, and Chapter 26, **1940 Code of Alabama,** portions of which are set out as Appendix F hereto, as construed by the Supreme Court of Alabama.[2] That the complaint as last amended (Appendix G), draws into question the constitutionality of a policy, custom or usage of the Board of Trustees of the University of Alabama, appears not only from the language thereof, but also from the interpretation placed thereon by the District Judge in his findings of fact and conclusions of law.

In the original complaint it was stated that this is a proceeding for a declaratory judgment and injunction for the purpose of determining "the question of whether or not the practice of defendants (including the Board of Trustees of the University of Alabama) in denying plaintiffs and other Negroes similarly situated, on account of their race and color, the right to enroll and pursue courses of study at the University of Alabama, constitutes a denial of the right of plaintiffs and other Negroes similarly situated the equal protection under the Fourteenth Amendment to the United States Constitution and the laws of the United States * * *." A similar statement is contained in the complaint as last amended (Appendix G), although the Board of Trustees of the University had been eliminated as a party defendant. In the complaint as last amended it is alleged that the

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[2] See Cox v. Board of Trustees of the University of Alabama, 161 Ala. 639, 49 So. 814.

plaintiffs "appealed to the Board of Trustees of the University of Alabama to change its policy, rules and regulations so as to admit plaintiffs and other Negroes similarly situated; * * * and after said consideration plaintiffs were notified by the Board of Trustees that they were denied admission to the University of Alabama; that such denial was based solely on plaintiffs' race and color."

In his amended findings of fact (Findings of Fact, Pargs. 6-7, Appendix A) the District Judge found as follows:

> "The evidence fails to disclose that there is a written policy or rule of the University denying admission to prospective students to that institution solely on the ground of race or color. However, other Negroes have made applications for admission. There is no evidence that any of them has ever been admitted."
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> * * * * * * *
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> "As late as May 31, 1955, one Agnes Studemire wrote Dr. Carmichael, President, stating she was desirous of taking some courses at the University Extension Center in Birmingham; that she was a Negro and would like to know whether or not the policy had changed for the admission of Negroes so that she might be accepted as a student. Dr. Carmichael replied to this letter advising her that 'the admission requirements of the University of Alabama have not changed in recent months.' "

In his amended conclusions of law (Conclusions of Law No. 5, Appendix A), the District Judge found as follows:

> "5. There is no written policy or rule excluding prospective students from admission to the University on account of race or color. However, there is a tacit policy to that effect. Defendant Adams has pursued such policy in denying applications for admission."

It is submitted that in this case there was drawn into question and adjudicated the constitutionality of a policy of the Board of Trustees of the University of Alabama, an arm and agency of the State of Alabama. It is further submitted that the effect of the judgment of the District Court is to enjoin and restrain the enforcement of such policy.

It is submitted that a District Court of three judges should have been constituted to consider the application for an injunction contained in plaintiffs' complaint, and that the District Court was without jurisdiction to grant the injunction embraced in its judgment.

II.

The individual members of the Board of Trustees of the University of Alabama were indispensable parties to this action.

In the complaint as last amended (Appendix G), it is alleged that, after defendant had informed the plaintiffs that the laws of the state would not permit the University to accept them as students, the plaintiffs applied to the then President of the University for admission, who refused plaintiffs' admission to the University on account of plaintiffs' race and color. It is further alleged that, thereafter, plaintiffs appealed to the Board of Trustees of the University of Alabama **to change its policy, rules and regulations so as to admit plaintiffs and other Negroes similarly situated**; that at its annual meeting on June 1, 1953, the Board of Trustees of the University of Alabama considered plaintiffs' request and application for admission to the University of Alabama, and after said consideration **plaintiffs were notified by the Board of Trustees that they were denied admission to the University of Alabama; that such denial was based solely on plaintiffs' race and color.** It affirmatively appears that in plaintiffs'

complaint, complaint is made not only of the action attributed to defendant, but also of that of the Board of Trustees of the University of Alabama.

In the prayer of plaintiffs' complaint as last amended (Appendix G), it is requested that the court "enter a judgment declaring that the policy, custom, usage and practice of the defendants in denying these plaintiffs and others similarly situated the right to enroll, enter and pursue courses of study at the University of Alabama, on account of their race and color, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and void." While it is true that the policy, custom, usage and practice, which the court is requested to declare unconstitutional and void, are identified as being those of the defendants, as already pointed out, it is alleged in the complaint as last amended that the Board of Trustees of the University of Alabama denied the plaintiffs admission to the University of Alabama and that such denial was based solely on plaintiffs' race and color. Of necessity, therefore, a declaratory judgment, declaring that the policy, custom, usage and practice of the defendants in denying the plaintiffs the right to enroll, enter and pursue courses of study at the University of Alabama, on account of their race and color, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and void, would vitally affect and concern the interests of the Board of Trustees of the University of Alabama and of the individual members thereof. Such is true not only by virtue of the fact that the Constitution and laws of the State of Alabama provide that the state university shall be under the management and control of a board of trustees; but also due to the fact that, in the complaint as last amended, it is alleged that the Board of Trustees of the

University of Alabama committed the same act as that alleged to have been committed by defendant, viz., denial to the plaintiffs admission to the University of Alabama solely on account of their race and color.

In his amended conclusions of law (Conclusions of Law, No. 5, Appendix A), the District Judge stated:

> "5. There is no written policy or rule excluding prospective students from admission to the University on account of race or color. However, there is a tacit policy to that effect. Defendant Adams has pursued such policy in denying applications for admission."

The judgment in this case, since it enjoins and restrains not only the defendant, William F. Adams, his servants, agents, assistants and employees, but also **those who might aid, abet, and act in concert with him,** requires action by the Board of Trustees of the University of Alabama in connection with its policy which plaintiffs alleged to exist and which the District Judge found to exist. The judgment in this case just as effectively enjoins and restrains the Board of Trustees of the University of Alabama from further application of said policy as if it, as a body corporate, or its individual members, had been named as parties defendant in this action. That such is true is shown by the interpretation placed on said judgment by counsel for plaintiffs subsequent to the entering thereof.

On February 6, 1956, after the plaintiff, Autherine J. Lucy, had registered as a student at the University of Alabama, and had attended classes for three days, she was excluded, until further notice, from attending classes, by a resolution adopted by the Board of Trustees of the University of Alabama, which recited that such action was taken solely for her safety, and for the safety of other students and of faculty members. Within three days thereafter, counsel for the plaintiff, Autherine J. Lucy, filed in

the district court a motion for the issuance of an order directed to the individual members of the Board of Trustees and the President of the University of Alabama, in addition to the defendant, to show cause why they should not be adjudged in contempt of said court for failing to comply with the judgment thereof. It was alleged in said motion that the suspension of Autherine J. Lucy was not necessary for her safety and the safety of others and that she had been suspended solely because of her race and color. In response to such motion, an order to show cause was issued, directed to all of the persons named in the motion. Such demonstrates, conclusively, that the District Judge, as well as counsel for plaintiffs, construed the judgment of the District Court as requiring action by the Board of Trustees of the University of Alabama, viz., the abandonment or withdrawal of its policy of excluding students from the University of Alabama on account of race or color.

It is submitted that the question under discussion is controlled by the principle approved in **Williams v. Fanning**, 332 U. S. 490, as follows:

> "These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."

The District Court, in its opinion in support of its judgment granting the motions of the several defendants to dismiss the original complaint, held that the Board of Trustees of the University of Alabama could not be sued in its corporate capacity as such was tantamount to a suit against the State of Alabama. Such, however, would not prevent suit being maintained against the individual members of said Board of Trustees.[3]

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[3] See Blackmar v. Guerre, 342 U. S. 512.

III.

Plaintiffs were not entitled to have this suit maintained and adjudicated as a class action and, more particularly, the District Court erred in including in its judgment an injunction against denying "others similarly situated" the right to enroll in the University of Albama and pursue courses of study thereat, solely on account of their race or color.

In the case of **Brown v. Board of Education of Topeka**, 347 U. S. 483, the Supreme Court referred to said case, and the three cases with which it was consolidated, as class actions and held that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. However, insofar as is shown by the reports of said cases, neither in the Supreme Court, nor in the courts below, was the question of the right to maintain a class action raised.

In 3 Moore's Federal Practice, Sections 23.04-23.06, the following statements are made:

> "By definition, an essential prerequisite to a class action is the existence of a 'class.'
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> . . . . . .
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> "Neither the multiplicity of parties, nor the inexpediency, nor the inconvenience of bringing parties before the court will, in themselves, justify the class suit; they are, however, matters which evidence impracticability. A reading of the cases convinces one that whether a number is so large that it would be impracticable to join all the parties is dependent not upon any arbitrary limit, but rather upon the circumstances surrounding the case; **and there must be a**

positive showing of such circumstances." (Emphasis added.)

. . . . . .

"**An action, of course, is not a class suit merely because it is designated as such in the pleadings; whether it is or not depends upon the attending facts.**" (Emphasis added.)

There was no proof in this case that there are many others besides plaintiffs, too numerous to be made parties, who constituted a "class" of persons similarly situated with the plaintiffs, viz., Negroes who had made application for admission as students to the University of Alabama and who, while possessing the requisite qualifications therefor, had been denied admission solely on account of their race or color.

The District Judge, in his amended findings of fact (Findings of Fact, Parg. 6, Appendix A), stated that other Negroes have made application for admission and that there is no evidence that any one of them has ever been admitted. He then quoted, in part, from a letter written by defendant to a Negro by the name of W. H. Hollins, who had applied for admission to the Law School of the University of Alabama. In said letter, after stating that the State had provided machinery "through the State Department of Education to assist colored students who desired to engage in the study of law to obtain opportunities for entering high grade institutions located elsewhere which accept colored students", defendant concluded by stating, "We hope you can persuade yourself not to file your application for admission here." In said letter, however, defendant stated that he was enclosing application forms, as requested, and that the application must be supported by transcripts in duplicate from the colleges attended. Defendant further pointed out that an applicant to the School of Law must meet the requirements set up

and announced by the Board of Commissioners of the Alabama State Bar.

It is submitted that the implied suggestion that W. H. Hollins avail himself of the procedure provided through the State Department of Education to assist colored students to engage in the study of law elsewhere, and the statement that "We hope that you can persuade yourself not to file your application for admission here," were not tantamount to a refusal by defendant to admit him as a student in the University of Alabama. The record is silent as to what transpired after the receipt by said W. H. Hollins of said letter from defendant. Various factors might have intervened to prompt him not to prosecute further his desire to enter the University of Alabama. Said W. H. Hollins testified as a witness on the trial of this case. He was not questioned with reference to what transpired following receipt by him of the letter addressed to him by defendant. In this connection, it is suggested that it is significant that he did not intervene as a party plaintiff in this case. Apparently he had abandoned, prior to the filing of this suit, any desire to be admitted as a student in the University of Alabama.

The defendant testified that, prior to receipt of the applications of the plaintiffs he had received application for admission from other Negro students. The record is silent, however, as to what handling was given said applications by the defendant. For aught that appears they were handled in a manner similar to that given to the letter written by W. H. Hollins. If so, it is submitted that a suggestion by the defendant that the applicants avail themselves of the procedure provided through the State Department of Education to assist colored students to enter high grade institutions located elsewhere, was not tantamount to a refusal by defendant to admit them as students in the University of Alabama. At any rate, there is no evidence in the record that any of said applicants were denied admis-

sion to the University of Alabama solely on account of race or color.

This action, if permissible as a class action, is a spurious class suit, and, since the judgment of the District Court cannot bind Negroes not parties to the suit, or who did not intervene therein, it should not, by its terms, be binding on defendant with respect to any rights of possible plaintiffs of the future.[4]

The judgment of the District Court is such as to impose upon defendant, his servants, agents, assistants, and their successors in office, for an illimitable time, the burden of acting, at the risk of a citation for contempt of court, not only upon all applications made by Negroes for admission to the University of Alabama, but also upon all disciplinary action against Negro students. In view of the far reaching effect of said judgment, the question of its validity with respect to its "class action" provisions is of substantial and grave importance.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Frontis H. Moore

FRONTIS H. MOORE

and

Edward D. Thomas

ANDREW J. THOMAS,

Counsel of Record for Petitioner.

Of Counsel:

BURR, McKAMY, MOORE & THOMAS.

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[4] See 3 Moore's Federal Practice, Sections 23.10-23.12.

Certificate of Service.

I hereby certify that I have on this date mailed by United States Mail, proper postage prepaid, three copies of the foregoing petition to Arthur D. Shores, Masonic Temple Building, Birmingham, Alabama, one of the attorneys of record for respondents, on this the 21 day of April, 1956.

Attorney for Petitioner.

APPENDIX A.

Opinion of the District Court.

AUTHERINE J. LUCY et al., Plaintiffs,

v.

WILLIAM F. ADAMS, Defendant.

No. 652.

United States District Court
N. D. Alabama, W. D.

This is an action brought by the plaintiffs for themselves and all other Negroes similarly situated for a declaratory judgment and an injunction. The suit is against William F. Adams, who is the Dean of Admissions of the University of Alabama. Plaintiffs charge that the defendant has denied them the equal protection of the laws guaranteed to them under the Fourteenth Amendment to the Constitution of the United States, in that he has refused to admit them to the University of Alabama on account of their race and color.

Findings of Fact.

The plaintiffs are citizens of Jefferson County, Alabama. Plaintiff Lucy attended Linden Academy at Linden, Alabama, from which institution she graduated in 1947. Plaintiff Myers attended Ullman and Parker High Schools in Birmingham, Alabama. She graduated from the latter institution in 1949. Plaintiffs graduated from Miles College in Birmingham, in May, 1952.

On September 4, 1952, plaintiffs by separate letters wrote the Dean of Admissions at the University of Alabama, stating that they were interested in attending the University and requesting application blanks. In the letter

written by the plaintiff, Polly Anne Myers, it was stated that she was interested in attending the University of Alabama to specialize in Library Science; while in the letter written by the plaintiff, Autherine J. Lucy, it was stated that she was interested in attending the University of Alabama to study journalism. On the following day the defendant replied, enclosing the necessary forms for admission. On that date the Assistant Dean of Women wrote the plaintiffs advising them of the facilities available at the University and stating that a check or a money order for $5 was required as a deposit for room reservation. Upon receipt of this information plaintiffs each forwarded their deposits. These deposits were acknowledged by a letter dated September 10, 1952, receipts for same were enclosed, and plaintiffs were advised they were assigned to Adams-Parker dormitory. On September 13, 1952, President Gallalee wrote the plaintiffs that Dean Adams had advised him that they were coming to the University and that he wished to assure them that they would be welcome on the campus.

Plaintiffs mailed their applications and transcripts of credits to the Dean of Admissions on September 17. These were received by Dean Adams on the afternoon of the 19th. Plaintiff Myers' application recites that she desired to register in the College of Arts and Science, majoring in Journalism, and that she planned to complete her work for the degrees of B. A. and M. A. at the University. Plaintiff Lucy's application recites that she desired to enter the College of Education, majoring in Library Science, and that she intended to complete her work for the degrees of B. S. and M. S.

On the morning of September 20, plaintiffs appeared at the offices of the Dean. There is a dispute in the evidence as to the exact conversation that occurred. It is undisputed, however, that defendant tendered to each of the

plaintiffs her room deposit and advised them the courses which they sought were available at Alabama State College in Montgomery.. Their applications were rejected at that time. By letter of September 24, 1952, plaintiffs, through their attorney, appealed to President Gallalee for admission to the University. Dr. Gallalee did not accept their applications for admission but contacted a party in Birmingham and asked him to intervene with the attorney in an attempt to persuade the plaintiffs to withdraw their applications and seek admission to the Alabama State College and Tuskegee Institute, both of which are Negro institutions. The attorney appealed to Governor Persons, President ex-officio of the Board of Trustees. Governor Persons placed the applications before the Board at its annual meeting on June 1, 1953. On June 6, 1953, Mr. Bealle, Secretary of the Board, wrote the attorney, stating:

> "* * * Much careful consideration was given to this matter by the Board but no final action was taken. The Board directed me to advise you, as attorney for the applicants, of its consideration of this matter and of its action deferring final action pending receipt of a court decision concerning litigation now before the Supreme Court of the United States.
>
> "The Board has also directed me to point out to you that there are courses in journalism and library science given at Alabama State College at Montgomery, or at Tuskegee Institute, which are available to your clients and to suggest that they make application for admission to those institutions."

On the occasion that the applications were considered by Dr. Gallalee and the Board of Trustees, neither Dr. Gallalee nor the Board took any steps to deny the applications on the ground that the plaintiffs did not possess the requisite scholastic requirements for admission.

The evidence fails to disclose that there is a written policy or rule of the University denying admission to prospective students to that institution solely on the ground of race or color. However, other Negroes have made applications for admission. There is no evidence that any one of them has ever been admitted. On the other hand, during the month of August, 1950, a Negro by the name of W. H. Hollins applied for admission to the Law School. The defendant furnished him an application, but the accompanying letter stated that the State had provided machinery "through the State Department of Education to assist colored students who desired to engage in the study of law to obtain opportunities for entering high grade institutions located elsewhere **which accept colored students.**" Defendant concluded his letter by stating that "We hope you can persuade yourself not to file your application for admission here."

As late as May 31, 1955, one Agnes Studemire wrote Dr. Carmichael, President, stating she was desirous of taking some courses at the University Extension Center in Birmingham; that she was a Negro and would like to know whether or not the policy had changed for the admission of Negroes so that she might be accepted as a student. Dr. Carmichael replied to this letter, advising her that "the admission requirements of the University of Alabama have not changed in recent months."

The University has a Department of Journalism in the College of Arts and Science and offers courses in that department. It also offers courses in School Library Services in its College of Education.

The evidence reveals that the defendant is vested with authority to receive or reject applications for admission to the University. If an application is rejected, the applicant may appeal his decision.

Conclusions of Law.

The Court concludes as follows:

1. The Court has jurisdiction of the parties and the subject matter of this action. Title 28, U. S. C. A., §§ 2201 and 1343.

2. This suit arises under the Constitution and Laws of the United States and seeks redress for the deprivation of civil rights guaranteed by the Fourteenth Amendment. Title 42, U. S. C. A., Sections 1983 and 1985.

3. Determination of the issues does not require a determination of the validity of any constitutional or statutory provision of Alabama under the Fourteenth Amendment. **Wichita Falls Junior College District v. Battle**, 5 Cir., 204 F. 2d 632.

4. This action is properly brought as a class action under Rule 23 (a) of the Federal Rules of Civil Procedure. **Wilson v. Board of Supervisors**, E. D. La., 92 F. Supp. 986; **Constantine v. Southwestern Louisiana Institute**, W. D. La., 120 F. Supp. 417; **Jinks v. Hodge**, E. D. Tenn., 11 F. R. D. 346; **Beal v. Holcombe**, 5 Cir., 193 F. 2d 384. See also **Brown v. Board of Education**, 347 U. S. 483, 495; **Brown v. Board of Trustees of LaGrange Independent Schools**, 5 Cir., 187 F. 2d 20, is distinguishable in that the plaintiff in that case wholly failed to plead or prove any deprivation of his personal rights. There the plaintiff appeared to be a mere volunteer. Where a person is able to establish his right to individual relief

> "... he may also under certain conditions ask that the benefit of that adjudication be extended to others, where they constitute a class standing generally in the same legal situation, where they are so numerous as to make it impracticable to bring them all before

the court, and where the granting of such relief seems likely to serve some useful legal purpose—for example, preventing a multiplicity of suits.

"Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed on a class basis or as a group policy, such as discrimination generally because of race, they are no less entitled to be made the subject of class actions and class adjudication under rule 23, Federal Rules of Civil Procedure, 28 U. S. C. A., than are other several rights . . ." **Kansas City, Mo. et al. v. Williams et al.**, 8 Cir., 205 F. 2d 47, at pp. 51-52.

5. There is no written policy or rule excluding prospective students from admission to the University on account of race or color. However, there is a tacit policy to that effect. Defendant Adams has pursued such policy in denying applications for admission.

6. Plaintiffs were denied admission to the University of Alabama solely on account of their race and color. In conformity with the equal protection clause of the Fourteenth Amendment, plaintiffs and others similarly situated are entitled to equal advantages and opportunities available at the Univeristy of Alabama at the same time and upon the same terms and qualifications available to other residents and citizens of the State of Alabama. **Missouri ex rel. Gaines v. Canada, Registrar of the University of Missouri**, 305 U. S. 337; **Sipuel v. Board of Regents of the University of Oklahoma**, 332 U. S. 631; **Sweatt v. Painter**, 339 U. S. 629; **McLaurin v. Oklahoma State Regents for Higher Education**, 339 U. S. 637; **Brown v. Board of Education**, supra; **Bruce v. Stilwell**, 5 Cir., 206 F. 2d 554; **McKissick v. Carmichael**, 4 Cir., 187 F. 2d 949; **Wichita Falls Junior College District v. Battle**, supra; **Wilson v. Board of Supervisors**, supra; **Constantine v. Southwestern Louisiana Institute**, supra.

7. Plaintiffs are entitled to a decree enjoining the defendant, William F. Adams, his servants, agents, assistants and employees, and those who might aid, abet, and act in concert with him, from denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race and color.

A decree will, accordingly, be entered for the plaintiffs.

This the 26th day of August, 1955.

H. H. Grooms,
Judge.

APPENDIX B.

Opinion of the Court of Appeals.

WILLIAM F. ADAMS, Appellant,

v.

AUTHERINE J. LUCY and POLLY ANNE MYERS, Appellees.

No. 15,839.

United States Court of Appeals,
Fifth Circuit.

Dec. 30, 1955.

Rehearing Denied Feb. 1, 1956.

Before Hutcheson, Chief Judge, and Borah and Brown, Circuit Judges.

"Per Curiam.

Brought by appellees, plaintiffs below, for themselves and all other negroes similarly situated, against William F. Adams, Dean of Admissions of the University of Alabama, charging that he had denied them the equal protection of the laws guaranteed to them under the Fourteenth Amendment, in that he had refused to admit them to the University of Alabama solely on account of their race and color, the suit was for a declaratory judgment and an injunction.

In a well considered opinion[1] dealing adequately with and disposing correctly of the issues joined, and upon findings of fact, which the record fully supports, and conclu-

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"[1] Lucy v. Adams, D. C., 134 F. Supp. 235, 239.

sions of law as fully supported by the authorities cited, the district judge determined[2] that plaintiffs were entitled to the decree they sought and entered judgment[3] accordingly.

Upon the considerations advanced and the reasons given by the district judge in his opinion, with which we find ourselves in complete agreement, the judgment is affirmed."

"[2] 'Plaintiffs are entitled to a decree enjoining the defendant, William F. Adams, his servants, agents, assistants and employees, and those who might aid, abet, and act in concert with him, from denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race and color.

'A decree will, accordingly, be entered for the plaintiffs.'

"[3] 'Judgment Upon Trial of Case on the Merits.

'Pursuant to the Findings of Fact and Conclusions of Law this day filed in this cause,

'It is ordered, adjudged and decreed as follows:

'1. That the defendant, William F. Adams, his servants, agents, assistants and employees, and those who might aid, abet, and act in concert with him, are hereby permanently enjoined and restrained from denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race or color.'"

APPENDIX C.

Judgment of the District Court.

AUTHERINE J. LUCY et al., Plaintiffs,

v.

WILLIAM F. ADAMS, Defendant.

No. 652.

United States District Court
N. D. Alabama, W. D.

"Pursuant to the Findings of Fact and Conclusions of Law this day filed in this cause,

It is Ordered, Adjudged and Decreed as follows:

1. That the defendant, William F. Adams, his servants, agents, assistants and employees, and those who might aid, abet, and act in concert with him, are hereby permanently enjoined and restrained from denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race or color.

2. That the costs are taxed against the defendant for which execution may issue.

Done and ordered, this the 1st day of July, 1955.

H. H. Grooms,
Judge."

APPENDIX D.

Judgment of the Court of Appeals.

"Judgment.

Extract From the Minutes of December 30th, 1955.

WILLIAM F. ADAMS

versus

AUTHERINE J. LUCY and POLLY ANNE MYERS.

No. 15839.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, William F. Adams, and the surety on the appeal bond herein, National Surety Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court."

* * * * * * *

APPENDIX E.

Art. 14, Sec. 264, Constitution of Alabama, 1901.

"The state university shall be under the management and control of a board of trustees, (a) which shall consist of two members from the congressional district in which the university is located, one from each of the other congressional districts in the state, the superintendent of education, and the governor, who shall be ex officio president of the board. The members of the board of trustees as now constituted shall hold office until their respective terms expire under existing law, and until their successors shall be elected and confirmed as hereinafter required. Successors to those trustees whose terms expire in nineteen hundred and two shall hold office until nineteen hundred and seven; successors to those trustees whose terms expire in nineteen hundred and four shall hold office until nineteen hundred and eleven; successors to those trustees whose terms expire in nineteen hundred and six shall hold office until nineteen hundred and fifteen; and thereafter their successors shall hold office for a term of twelve years. When the term of any member of such board shall expire, the remaining members of the board shall, by secret ballot, elect his successor; provided, that any trustee so elected shall hold office from the date of his election until his confirmation or rejection by the senate, and, if confirmed, until the expiration of the term for which he was elected, and until his successor is elected. At every meeting of the legislature the superintendent of education shall certify to the senate the names of all who shall have been so elected since the last session of the legislature, and the senate shall confirm or reject them, as it shall determine is for the best interest of the university. If it rejects the names of any members, it shall thereupon elect trustees in the stead of those rejected. In case of a vacancy on said

board by death or resignation of a member, or from any cause other than the expiration of his term of office, the board shall elect his successor, who shall hold office until the next session of the legislature. No trustee shall receive any pay or emolument other than his actual expense incurred in the discharge of his duties as such."

APPENDIX F.

Chap. 26, 1940 Code of Alabama (Secs. 486-509, Title 52).

"§ 486. Body corporate.—The governor and the state superintendent of education, by virtue of their respective offices, and the trustees heretofore appointed from the different congressional districts of the state under the provisions of section 264 of the constitution, and such other members as may be from time to time added to the board of trustees and their successors in office, are constituted a body corporate under the name of 'The Board of Trustees of the University of Alabama,' to carry into effect the purposes and intent of the Congress of the United States in the grant of lands by the act of April 20, 1818, and of the act of March 2, 1819, to this state, to be by it held and administered for the benefit of a seminary of learning (1927 School Code, § 543)."

"§ 487. Corporate powers.—Such corporation shall have all the rights, powers, and franchises necessary to or promotive of the end of its creation, and shall be charged with all the corresponding duties, liabilities, and responsibilities (1927 School Code, § 544)."

"§ 491. Rights, franchises, properties and privileges retained.—In addition to the rights, properties, privileges, and franchises herein granted, all rights, properties, privileges, and franchises heretofore, by any act of the legislature, granted to or vested in the University of Alabama, shall vest and continue in such corporation (1927 School Code, § 548)."

"§ 492. Appointment of faculty.—The board of trustees have the power to organize the university by appointing a corps of instructors, who shall be styled the faculty of the university, and such other officers as the interest of the

university may require; to remove such instructors or officers, and to fix their salaries or compensation, and increase or reduce the same at their discretion; to institute, regulate, alter, or modify the government of the university, as they may deem advisable; to prescribe courses of instruction, rates of tuition, price of board, and regulate the necessary expenses of students; and to confer such degrees as are usually conferred by similar institutions. They may delegate to the faculty of the university, or other officers, such powers and functions in the government of the students, and in the administration of the affairs of the university, as they may deem proper; but in no case shall any person be authorized to receive, hold or disburse any funds of the university without having first given bond, conditioned for the faithful discharge of his duties; and no person shall be excluded from the full benefit of the university fund, or placed at any disadvantage in the pursuit of his studies, who possesses the requisite literary or other qualifications, and is willing to submit to the discipline prescribed for the students (1927 School Code, § 549)."

"§ 493. Trustees.—The state university shall be under the control of the board of trustees, which shall consist of two members from the congressional district in which the university is located, and one from each of the other congressional districts in the state, the state superintendent of education, and the governor, who shall be ex-officio president of the board. The members of the board of trustees, as now constituted, shall hold office until their respective terms expire under existing law, and until their successors shall be elected and confirmed, as hereinafter required. Successors to those trustees whose terms expire in nineteen hundred and two shall hold office until nineteen hundred and seven; successors to those whose terms expire in nineteen hundred and four shall hold office until nineteen hundred and eleven; successors to those trustees whose terms expire in nineteen hundred and six shall hold office until

nineteen hundred and fifteen; and thereafter their successors shall hold office for a term of twelve years. When the term of any member of such board shall expire, the remaining members of the board shall, by secret ballot, elect his successor, provided, that any trustee so elected shall hold office from the date of his election until his confirmation or rejection by the senate, and if confirmed, until the expiration of the term for which he was elected, and until his successor is elected. At every meeting of the legislature the state superintendent of education shall certify to the senate the names of all who have been so elected since the last session of the legislature and the senate shall confirm or reject them as it shall determine for the best interest of the university. If it rejects the names of any members it shall thereupon elect trustees in the stead of those rejected. In the case of a vacancy on said board by death or resignation of a member, or from any cause other than the expiration of his term of office, the board shall elect his successor, who shall hold office until the next session of the legislature, when the name of a successor or successors elected by said board to fill the vacancy or vacancies so occasioned shall be certified by the state superintendent of education to the senate, and the senate shall confirm, or reject, as it shall determine is for the best interest of the university; and if confirmed by the senate, the person or persons so elected to fill said vacancy shall hold office for the unexpired term to which he is so elected. If the senate rejects the name of any person to fill said vacancy, it shall thereupon elect some person or persons in the stead of those rejected. No trustee shall receive any pay or emolument other than his actual expenses incurred in the discharge of his duties as such (1927 School Code, § 550)."

APPENDIX G.

AUTHERINE J. LUCY and POLLY ANNE MYERS,
Plaintiffs,

v.

WILLIAM F. ADAMS et al.,
Defendants.

Civil Action No. 652.

United States District Court,
N. D. Alabama, W. D.

Complaint as Last Amended.

Filed October 11, 1954.

"1. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under the Fourteenth Amendment to the Constitution of the United States and the laws of the United States, namely, Title 8, United States Code, Section 41, as hereinafter more fully appears. The matter in controversy, exclusive of interest and costs, the sum or value of three thousand ($3000.00) Dollars.

2. The jurisdiction of this Court is also invoked under Title 28, United States Code, Section 1343, this being a suit in equity authorized by law to be brought to redress the deprivation under color of law, statute, regulation, custom and usage of a state of rights, privileges and immunities secured by the Constitution of the United States, viz., Sections 41 and 43 of Title 8 of the United States Code and the Fourteenth Amendment to the Constitution of the United States providing for the equal rights of citizens and of all other persons within the jurisdiction of the United States, as hereinafter more fully appears.

3. Plaintiffs show further that this is a proceeding for a Declaratory judgment and injunction under Title 28, United States Code, Section 2201, for the purpose of deter-

mining a question in actual controversy between the parties to-wit: The question of whether or not the practice of defendants, in denying plaintiffs and other Negroes similarly situated, on account of their race and color, the right to enroll and pursue courses of study at the University of Alabama, constitutes a denial of the right of plaintiffs and other Negroes similarly situated, the equal protection under the Fourteenth Amendment to the United States Constitution, and the laws of the United States, all of which will appear more fully hereinafter.

4. All of the parties to this action, both plaintiffs and defendants, are citizens of the United States and the State of Alabama, and are residents and domiciled in said State.

5. Plaintiffs bring action in their own behalf and in behalf of all other Negroes similarly situated with respect to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being common questions of law and fact, a common relief being sought, as will hereinafter more fully appear, plaintiffs present this action as a class suit, pursuant to Rule 23 (a) of the Federal Rules of Civil Procedure.

6. Defendants, Oliver Cromwell Carmichael, is the duly appointed, qualified and acting President of said University, and as such governs and controls the several colleges and schools of said University; William F. Adams is the Dean of Admissions of said University; and possesses the authority to pass upon the eligibility of applicants, who seek to enroll as students therein, including your plaintiffs.

Defendants herein are being sued in their individual capacities although claiming to act under color of office.

7. The schools of Department of Journalism and Library Science at the University are the only accredited courses in these fields within the State maintained by the State

and under its control. Plaintiffs desire that they be admitted as students at the next registration period after the cause has been heard and determined and are ready, willing and able to pay the requisite uniform fees and conform to the lawful uniform rules and regulations for admission to such courses, applicable alike to all other students.

8. On, to-wit, September 9, 1952, plaintiffs applied for admission to the University of Alabama, and complied with all the rules and regulations entitling them to admission, by filing with the proper officials of the University an official transcript of their scholastic records, and sent in deposits for their room assignment, which room assignment was made as shown by Plaintiffs' Exhibits A and B hereto attached and made a part of this complaint. Plaintiffs also received letters of welcome from the then President of the University, as shown by Plaintiffs' Exhibits C and D, hereto attached and made a part of this complaint.

9. Plaintiffs further allege that to complete their registration they appeared in person in the office of the Dean of Admissions, William F. Adams, on September 22, 1952, and that after a conference with the said Dean of Admissions, he informed plaintiffs that a mistake had been made in accepting their applications, and that the laws of the State would not permit the University to accept them as students.

10. Plaintiffs subsequently applied to the then President of the University for admission, who refused plaintiffs admission to the University on account of plaintiffs' race and color. Plaintiffs, subsequent to the refusal of the President, appealed to the Board of Trustees of the University of Alabama, to change its policy, rules and regulations so as to admit plaintiffs and other Negroes similarly situated. That at its annual meeting on June 1, 1953, the Board of Trustees of the University of Alabama considered plaintiffs' request and application for admission to the

University of Alabama, and after said consideration plaintiffs were notified by the Board of Trustees that they were denied admission to the University of Alabama. That such denial was based solely on plaintiffs' race and color. That in refusing plaintiffs' admission to the University, defendants were in fact, acting personally, although purporting to act under color of their office.

11. Defendants have established and are maintaining a policy, custom and usage of denying to qualified Negro applicants the equal protection of the laws by refusing to admit them into the schools of Journalism and Library Science at the University of Alabama, solely because of race and color and have continued the policy of refusing to admit qualified Negro applicants into the said school, while at the same time admitting white applicants with equal or less qualifications than Negro applicants solely on account of race and color.

12. Plaintiffs, and those similarly situated and affected, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate nor complete remedy to redress the wrongs and illegal acts herein complained of other than this suit for a declaration of rights and an injunction. Any other remedy to which plaintiffs and those similarly situated, could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience, not only to the plaintiffs and those similarly situated, but to defendants as governmental agencies.

13. There is between the parties an actual controversy, as hereinbefore set forth.

Wherefore, Plaintiffs respectfully pray the Court that upon filing of this complaint, as may appear proper and convenient to the court, the court advance this cause on

the docket and order a speedy hearing on this action according to law and that upon such hearing:

1. This court adjudge, decree and declare the rights and legal relations of the parties to the subject matter here in controversy, in order that such declaration shall have the force and effect of a final judgment or decree.

2. That this court enter a judgment or decree declaring that the policy, custom, usage and practice of the defendants in denying these plaintiffs and others similarly situated the right to enroll, enter and pursue courses of study at the University of Alabama, on account of their race and color is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and void.

3. That this court issue a permanent injunction forever restraining and enjoining defendants, and each of them, from denying plaintiffs, and others similarly situated, the right to enroll and pursue courses of study in Journalism, Library Science and other subjects at the University of Alabama, solely on account of their race and color.

4. Plaintiffs further pray that the court will allow them their costs herein and such further, other, additional or alternative relief as may appear to the Court to be equitable and just.

Arthur D. Shores,
1630 Fourth Avenue, No.,
Birmingham, Ala.,
Thurgood Marshall,
107 West 43rd Street,
New York 36, N. Y.,
Robert L. Carter,
107 West 43rd Street,
New York 36, N. Y."

"Exhibit 'A'—Room Assignment to Miss Autherine J. Lucy from Office of the Dean of Women, University of Alabama, dated 9/10/52;

Exhibit 'B'—Room Assignment to Miss Polly Anne Myers from the Office of the Dean of Women, University of Alabama, dated 9/10/52;

Exhibit 'C'—Letter of Welcome, John M. Gallalee, Office of the President, University of Alabama, to Miss Autherine J. Lucy, dated 9/13/52;

Exhibit 'D'—Letter of Welcome, John M. Gallalee, Office of the President, University of Alabama, dated 9/13/52, to Miss Polly Anne Myers."

The above exhibits have not been included inasmuch as they are not material to the questions presented for review.

APPENDIX H.

AUTHERINE J. LUCY and POLLY ANNE MYERS,
Plaintiffs,

v.

WILLIAM F. ADAMS et al.,
Defendants.

Civil Action No. 652.

United States District Court,
N. D. Alabama, W. D.

Motion to Dismiss Complaint as Last Amended Filed on Behalf of William F. Adams.

Filed January 18, 1955.

"Comes the defendant, William F. Adams, and moves the court to dismiss the action, as set out in the complaint as last amended, and for grounds of such motion assigns the following, separately and severally:

1. The complaint as last amended fails to state a claim against this defendant upon which relief can be granted.

2. The complaint as last amended fails to show a case of actual controversy between plaintiffs, or either of them, and this defendant upon which relief can be granted.

* * * * * * *

5. It does not sufficiently appear that the plaintiffs are authorized to maintain this action as a class action, pursuant to Rule 23 (a), Federal Rules of Civil Procedure for District Courts.

* * * * * * *

9. It appears that plaintiffs appealed to the Board of Trustees of the University of Alabama to change its poli-

cies, rules and regulations so as to admit plaintiffs to the University of Alabama, and that said Board of Trustees refused to admit them to the University of Alabama, and that this suit is based on said action of the Board of Trustees of the University of Alabama, an arm and agency of the State of Alabama, and is not based on the action of this defendant.

* * * * * * *

14. It is averred that the plaintiffs were denied admission to the University of Alabama by official action taken by the Board of Trustees of the University of Alabama at its annual meeting, whereas the court judicially knows that this defendant is not a member of the Board of Trustees of the University of Alabama, and was not a member thereof during any of the period of time material to the plaintiffs' claim for relief; wherefore defendant states that the individual members of the Board of Trustees of the University of Alabama are necessary and indispensable parties to this action because of their interest in the subject matter thereof, and that an order of court should be entered requiring the plaintiffs to bring in as parties defendant the individual members of the Board of Trustees of the University of Alabama.

* * * * * * *

16. It is averred that the plaintiffs were denied admission to the University of Alabama by official action taken by the Board of Trustees of the University of Alabama at its annual meeting; whereas the court judicially knows that this defendant is not a member of the Board of Trustees of the University of Alabama, and was not a member thereof during any of the period of time material to the plaintiffs' claim for relief, and that this defendant has no authority or power to act contrary to, or in disregard of, said official action taken by the Board of Trustees of the University of Alabama, wherefore defendant states that the individual members of the Board of Trustees of the

University of Alabama are necessary and indispensable parties to this action because of their interest in the subject matter thereof, and that an order of court should be entered requiring the plaintiffs to bring in as parties defendant the individual members of the Board of Trustees of the University of Alabama.

Burr, McKamy, Moore & Tate,
By Frontis H. Moore,
Frontis H. Moore,
and
Andrew J. Thomas,
Andrew J. Thomas,
Attorneys for Defendant, William F. Adams,
1038 Brown-Marx Building,
Birmingham, Alabama."

Portions of the above motion, which are not material to the questions presented for review, have been omitted.

APPENDIX I.

AUTHERINE J. LUCY and POLLY ANNE MYERS,
Plaintiffs,

v.

WILLIAM F. ADAMS et al.,
Defendants.

Civil Action No. 652.

United States District Court
N. D. Alabama, W. D.

Answer to the Complaint, as Last Amended, Made on Behalf of the Defendant, William F. Adams, Individually.

Filed March 15, 1955.

"1. Defendant denies each and every material averment of paragraph numbered 3 of the complaint as last amended.

2. Defendant states that he is not sufficiently advised as to the citizenship and place of residence, as well as domicile, of the plaintiffs and demands proof thereof.

3. Defendant denies that the plaintiffs have the right or standing to bring this action 'in behalf of all other Negroes similarly situated with respect to the matters here involved'; or to bring this action as a class suit, or class action, pursuant to Rule 23 (A), Federal Rules of Civil Procedure for District Courts.

4. Defendant admits that the defendant, Oliver Cromwell Carmichael, is the duly appointed, qualified and acting President of the University of Alabama. Defendant admits that he is the Dean of Admissions of the University of Alabama. Defendant denies each and every other material averment of paragraph numbered 6 of the complaint as last amended.

5. Defendant denies each and every material averment of paragraph numbered 7 of the complaint as last amended.

6. Defendant admits that he has been advised that the letters, copies of which are attached to the complaint as last amended, being marked Exhibit A, Exhibit B, Exhibit C and Exhibit D, were written by, or on behalf of, the persons whose names purport to be signed thereto. Defendant denies that any of said letters were written by him. Defendant admits that, by written applications dated September 16, 1952, plaintiffs made applications for admission to the University of Alabama, and that the plaintiffs submitted transcripts, dated September 17, 1952, of their scholastic records, which applications and transcripts were not received until after each of the letters, copies of which are attached to the complaint as last amended, being marked Exhibit A, Exhibit B, Exhibit C and Exhibit D, had been written and mailed. Defendant denies all other material averments of paragraph numbered 8 of the complaint as last amended.

7. Defendant admits that the plaintiffs appeared in person in his office on September 22, 1952, with reference to their registration as students in the University of Alabama. Defendant denies all other material averments of paragraph numbered 9 of the complaint as last amended.

8. Defendant states that the averments of paragraph numbered 10 of the complaint as last amended do not purport to pertain to any action taken by the defendant. Defendant states that he is without personal knowledge as to the truthfulness thereof and demands proof hereof.

9. Defendant denies each and every material averment of paragraph numbered 11 of the complaint as last amended.

10. Defendant denies each and every material averment of paragraph numbered 12 of the complaint as last amended.

11. Defendant denies each and every material averment of paragraph numbered 13 of the complaint as last amended.

12. Defendant further interposes, separately and severally, the following defenses to the complaint as last amended.

First Defense.

The complaint as last amended fails to state a claim against this defendant upon which relief can be granted.

Second Defense.

Defendant is not guilty of the matters complained of in the complaint as last amended.

Third Defense.

Plaintiffs do not have the right or standing to bring this action 'in behalf of all other Negroes similarly situated with respect to the matters here involved; or to bring this action as a class suit, or class action, pursuant to Rule 23 (A), Federal Rules of Civil Procedure for District Courts.

Fourth Defense.

This action is in reality an action against the State of Alabama and plaintiffs have no right to maintain the same.

Fifth Defense.

This action is in reality an action against the Board of Trustees of the University of Alabama and plaintiffs have no right to maintain the same.

Sixth Defense.

The complaint as last amended constitutes a complete departure from the original complaint and therefore works

a discontinuance of the claim for relief contained in the original complaint.

Seventh Defense.

There is a complete change of parties defendant in the complaint as last amended from those set out in the original complaint and therefore there has been worked a discontinuance of the claim for relief contained in the original complaint.

Eighth Defense.

Plaintiffs are not entitled to the relief prayed for.

Burr, McKamy, Moore & Tate,
By Frontis H. Moore,
Frontis H. Moore,
and
By Andrew J. Thomas,
Andrew J. Thomas,
Attorneys for Defendant, William F. Adams, Individually."

No. 892

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 15,889.

WILLIAM F. ADAMS,
Appellant,

vs.

AUTHERINE J. LUCY and POLLY ANNE MYERS,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama, Western Division.

PETITION FOR REHEARING.

FRONTIS H. MOORE,
ANDREW J. THOMAS,
1038 Brown-Marx Building,
Birmingham, Alabama,
Attorneys for Appellant.

Of Counsel:
BURR, McKAMY, MOORE & THOMAS,
Birmingham, Alabama.

U. S. COURT OF APPEALS
FILED
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John A. Foster, Jr.

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TABLE OF AUTHORITIES.

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Case Cited.

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Statute Cited.

Federal Rules of Civil Procedure, Rule 23 (a).....1, 5, 6

Textbook Cited.

3 Moore's Federal Practice 3418..... 3
3 Moore's Federal Practice 3422..... 5

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 15,839.

WILLIAM F. ADAMS,
Appellant,

vs.

AUTHERINE J. LUCY and POLLY ANNE MYERS,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama, Western Division.

PETITION FOR REHEARING.

Appellant respectfully petitions the Court to set aside its opinion and vacate its judgment entered in this case on December 30, 1955, and to grant a rehearing. Appellant shows that this Court erred in its said opinion and judgment in the following particulars:

(1)

In affirming the holding of the District Court that this action is properly brought as a class action under Rule 23 (a), Federal Rules of Civil Procedure.

(2)

In affirming the judgment of the District Court enjoining the defendant (appellant), his servants, agents, assistants, and employees, and those who might aid, abet, and act in concert with him, from denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race or color and, particularly, that portion thereof which includes within the scope thereof "others similarly situated."

Under Proposition V of the brief of argument, in the brief filed on behalf of appellant on the appeal of this case, there are cited authorities which, it is submitted, sustain the proposition that the plaintiffs were not entitled to have this suit maintained and adjudicated as a class action. Argument in support of such proposition is contained on pages 41-55 of said brief. After the printing of said brief, there was brought to the attention of counsel for appellant the opinion of this Court, dated October 26, 1955, granting a rehearing in the case of **Board of Supervisors of Louisiana State University and Agricultural and Mechanical College v. Alexander P. Tureaud**, 226 F. 2d 714, to which reference was made by counsel for appellant in the oral argument at the time of the submission of this case on appeal. In said opinion of this Court, there are contained the following statements:

> "In this record, there is no proof to sustain the allegation that there are many others besides complainant, too numerous to make parties, having the identical status and possessing the necessary qualifications for admission to the same college and courses. Certainly there can be no such all-inclusive injunction covering all members of an alleged class without proof that the others desire to be so represented in substantial numbers or have requested plaintiff so to represent them. Such facts cannot be assumed. 3 Moore's

Federal Practice, 3418 et seq.; Rule 23, Fed. Rules Civ. Proc., 28 U. S. C. A.; Weeks v. Bareco Oil Co., 7 Cir., 125 F. 2d 84."

In its opinion in the **Tureaud** case, dated January 6, 1956, this Court, in affirming the order of the District Court appealed from, based its action on "the reasons stated in the majority and concurring opinions of the court dated August 23, 1955," in which no reference is made to the propriety of the class action feature of the order of the District Court. It is, therefore, submitted that there has been no express revocation by this Court of the above quoted principle contained in its opinion in the **Tureaud** case, dated October 26, 1955.

It is submitted that the above quoted principle contained in the opinion of this Court in the **Tureaud** case, dated October 26, 1955, is in all material respects identical with the proposition contained in the brief filed on behalf of appellant on the appeal of this case, that the plaintiffs were not entitled to have this suit maintained and adjudicated as a class action. It is submitted that in the record on this appeal there was no proof to sustain the allegation contained in the complaint as last amended (R. 36) to the effect that there are "other Negroes similarly situated with respect to the matters here involved—so numerous as to make it impracticable to bring them all before the court—there being common questions of law and fact . . ."

In 3 Moore's Federal Practice 3418 et seq., cited by this Court in its opinion in the **Tureaud** case, dated October 26, 1955, the following statements appear:

> "By definition, an essential prerequisite to a class action is the existence of a 'class' " (p. 3418).
>
> . . . . . .
>
> "Neither the multiplicity of parties, nor the inexpediency, nor the inconvenience of bringing parties before the court will, in themselves, justify the class

suit; they are, however, matters which evidence impracticability. A reading of the cases convinces one that whether a number is so large that it would be impracticable to join all the parties is dependent not upon any arbitrary limit, but rather upon the circumstances surrounding the case; **and there must be a positive showing of such circumstances.**" (Emphasis added.) (p. 3422.)

. . . . . .

"**An action, of course, is not a class suit merely because it is designated as such in the pleadings; whether it is or is not depends upon the attending facts.**" (Emphasis added.) (p. 3423.)

On pages 51-53 of the brief filed on behalf of appellant on this appeal, comment is made on the evidence contained in the record on appeal reflecting on the existence of a class or of "other Negroes similarly situated—so numerous as to make it impracticable to bring them all before the court." In reply thereto, on page 16 of the brief filed on behalf of appellees, the following statements are made:

". . . the defendant himself testified that other Negro students have applied for admission (R. 93). Hill Ferguson, a member of the Board of Trustees of the University of Alabama, testified that other Negro students have applied 'from time to time **in the last 15 or 20 years**' (R. 70). This defendant wrote one applicant, 'I am venturing to write you a friendly letter to tell you frankly that the problem posed by your application is one of which we have long been conscious and which we have from time to time been called upon in the past to meet' (R. 156). There is no evidence that any of the applicants have ever been admitted." (Emphasis added.)

It is submitted that in so summarizing the evidence reflecting on the existence of a class, counsel for appellees

undertook to do so in a manner most favorable to their contention that a class existed. It is submitted, however, that the inconclusiveness of such summarization is demonstrated in the final sentence thereof, in which it is stated that "there is no evidence that any of the applicants have ever been admitted." But, as shown in the above-quoted excerpt from 3 Moore's Federal Practice 3422, "**there must be a positive showing of such circumstances.**" Certainly, the burden imposed on appellees, of a positive showing of the existence of a class, was not met by the lack of evidence that any Negro who had applied for admission had been admitted. Certainly, the burden imposed on appellees, by the averments in the complaint as last amended, to show the existence of a class of which they were represented members, could not be shifted to appellant by imposing on him the burden of showing that no such class existed.

On page 16 of the brief filed on behalf of appellees on this appeal it is stated:

> "To require plaintiffs to prove that the class is numerous would place on plaintiffs an unnecessary burden, since that is obvious from the facts and circumstances of this case, and an impossible burden since the large Negro population of the state makes it impossible for plaintiffs to know or bring before the court all Negro students who have applied and who have been denied admission, solely because of race and color."

Certainly, such statement cannot be construed other than as an admission on behalf of appellees that the evidence contained in the record on appeal did not show the existence of persons constituting a class so numerous as to make it impracticable to bring them all before the court, which is prerequisite to the maintenance of a class action under Rule 23 (a), Federal Rules of Civil Procedure. It is not

contended on behalf of appellant that appellees should know or bring before the court all Negro students who have applied and who have been denied admission, solely because of race and color. However, it is contended that the burden was on the appellees to show the existence of a class of Negroes who have applied to the University of Alabama for admission as students and **who were denied admission by appellant** solely because of race and color, the members of which class are so numerous as to make it impracticable to bring them all before the court.

It is submitted that there was a complete failure on the part of appellees to show the existence of a "class" for whose benefit this suit might be maintained.

As stated in the brief filed on behalf of appellant on the appeal of this case (pp. 54-55), while it might be said that the averments of the complaint as last amended, on their face, were sufficient to permit the appellees to maintain this action as a class action, it is submitted that, in view of the evidence introduced on the trial thereof and the failure thereof to show the existence of a class, composed of other Negroes similarly situated, viz., who had made application for admission as students to the University of Alabama and who, while possessing the requisite qualifications for admission, had been denied admission solely on account of their race and color, and that the members thereof were so numerous as to make it impracticable to bring them all before the Court, the District Court erred in holding that this action is properly brought as a class action under Rule 23 (a), Federal Rules of Civil Procedure, and in including in its judgment an injunction against denying "others similarly situated" the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race or color.

Wherefore, appellant prays that the opinion and judgment of this Court entered in this case on December 30, 1955,

be recalled and that a rehearing be granted to consider the errors urged above, and on final hearing that a judgment be entered reversing the judgment of the District Court and remanding the case to the District Court with instructions to eliminate from its opinion its conclusion that this action is properly brought as a class action and from its judgment the class feature thereof.

Appellant further prays for all orders and decrees necessary and for general and equitable relief.

.....
FRONTIS H. MOORE
and

.....
ANDREW J. THOMAS,
Birmingham, Alabama,
Attorneys for Appellant.

Of Counsel:
BURR, McKAMY, MOORE & THOMAS,
Birmingham, Alabama.

This is to certify that a copy of this petition for rehearing has been mailed by United States Mail, postage prepaid, to Arthur D. Shores, Masonic Temple Building, Birmingham, Alabama, one of the attorneys for appellees, on this the.....day of January, 1956.

.....
Attorney for Appellant.